No. 723

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

FRED FRANKEN, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Fred Franken, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered by the United States District Court for the Northern District of West Virginia.

OPINION BELOW

The opinion of the Court of Appeals is reported in 248 F. 2d. 789, and is reprinted as Appendix A hereto. There was no opinion in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered October 18, 1957.

A petition for rehearing was filed within the prescribed period and was denied by the Court of Appeals without opinion on November 19, 1957. The denial of rehearing is reprinted as Appendix C hereto.

On December 4, 1957, the Court of Appeals recalled its mandate of November 26, 1957, and stayed further proceedings to December 19, 1957, to enable petitioner to apply for certiorari.

On December 11, 1957, Chief Justice Warren extended the time for filing this petition to January 18, 1958. Petitioner duly notified the Solicitor General of the United States of the extension.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was petitioner deprived of his right to a fair trial and to the effective assistance of counsel by the refusal of the trial court to grant a continuance?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

Of importance also are the following quoted sections of Title 18.

TITLE 18, U.S.C.

"§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than

$10,000 or imprisoned not more than five years, or both . . .

"§ 2314. *Transportation of stolen goods, securities, monies, or articles used in counterfeiting.*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ."

"§ 2315. *Sale or receipt of stolen goods securities, or monies.*

Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ."

STATEMENT

Petitioner was convicted under 18 U.S.C. § 371 of conspiring with others to commit the offense of transporting and selling shipments of steel in interstate commerce knowing the same to have been stolen, in violation of 18 U.S.C. §§ 2314-2315.

Petitioner, age fifty-eight, a resident of Youngstown, Ohio, with a wife and five children and with but two years of high school education, was an independent steel broker engaged in the business of buying and selling steel in the tri-state area of West Virginia, Ohio

and Pennsylvania. In the fall of 1954 he stopped at the Lorentzen Hardware Mfg. Corp. at Weirton, West Virginia, and for the first time met Paul Albert DeArdo who introduced himself as plant manager. Through subsequent negotiations with DeArdo, petitioner purchased a number of truck loads of coil steel over a period of about one year which he resold to other steel manufacturing concerns for normal commissions. Following the general custom of independent steel brokers his purchases were always in cash. The steel was shipped by bona fide trucking concerns licensed as common carriers. Petitioner was never present when any of the steel was loaded and moved by the carriers from the Lorentzen Hardware plant. In handling the transactions DeArdo was occasionally assisted by the chief mechanic at Lorentzen Hardware, James A. Whitehead. After the company discovered shortages in its steel inventory DeArdo and Whitehead admitted selling the steel to petitioner and others and keeping the proceeds. Both DeArdo and Whitehead were jointly indicted with petitioner and entered pleas of guilty prior to petitioner's trial. They testified on behalf of the government and were sentenced subsequent to the trial. Petitioner readily acknowledgd the transactions but denied knowledge that the steel was stolen or that the proceeds were being wrongfully converted by DeArdo and Whitehead. Evidence of his guilty knowledge was entirely circumstantial. Another steel broker, Albert Green, indicted separately for purchasing steel from DeArdo under identical circumstances, was subsequently acquitted.

Petitioner was indicted at Wheeling, West Virginia, December 12, 1956, following an investigation by the government consuming more than one year. During

the investigation by the government, petitioner cooperated with agents of the F.B.I. and freely and voluntarily supplied the agents with all information as to purchases made, names of carriers which transported the steel, and names and addresses of consignees. He first learned of the indictment December 14th and immediately consulted his attorney, James M. Modarelli, of Youngstown, Ohio. On December 17th, Mr. Modarelli wrote the United States Attorney, Albert M. Morgan, at Fairmont, West Virginia, requesting an interview, Fairmont being about 200 miles from petitioner's home at Youngstown. By letter of December 19th, Mr. Morgan advised that such an interview could be arranged after the first of the year. The interview was held at Fairmont, West Virginia, January 4, 1957, following which petitioner retained Wesley R. Tinker, Jr., of Wheeling, West Virginia, as local counsel. Mr. Modarelli, not being a criminal lawyer, then withdrew from the case. Petitioner was arraigned at Wheeling on January 7th and pleaded not guilty. On January 10th, the United States Attorney advised petitioner that his case was set for trial January 21st. Three days later Mr. Tinker's father-in-law, Attorney Charles McCamic of Wheeling, died suddenly. Under the circumstances Mr. Tinker immediately attempted to obtain a continuance. Although not resisted by the government, the continuance was denied by the court. By reason of the death in his family and the refusal of the court to grant a continuance, Mr. Tinker withdrew as counsel. On January 16th, petitioner again traveled to Wheeling to retain the firm Goodwin, Spillers and Mead as local counsel, and conferred with the senior member, Russell B. Goodwin. Arrangements for representation were not completed with Mr. Goodwin until the following day, January 17th. Mr. Goodwin

immediately prepared and filed motions for a bill of particulars and for discovery and inspection which were later denied. On Sunday, January 20th, Mr. Goodwin was taken ill and confined to bed. The next day, January 21st, the day set for trial, the court was informed of these facts, including the unexpected illness of Mr. Goodwin. A renewed motion for continuance was denied and petitioner was put to trial represented by an associate member of the firm, C. Lee Spillers. Mr. Spillers was absent from the city when petitioner retained his firm and had spent scarcely two days over the weekend assisting Mr. Goodwin in preparation for trial. Conviction followed. Petitioner, a businessman of integrity and good reputation, was sentenced to three years imprisonment and fined $3,000.

REASONS FOR GRANTING THE WRIT

By Affirming the Action of the District Court in Refusing to Grant Petitioner's Counsel Sufficient Time in Which to Prepare for Trial, Where It Appears From the Record That Three Previous Attorneys Retained by Petitioner Were Unable to Represent Him Because of Illness or for Other Reasons Beyond Petitioner's Control, the Court of Appeals so Far Sanctioned a Departure by the District Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision. The Law of Continuances in Federal Criminal Practice Has Not Been, but Should be, Settled by This Court.

The only ground for seeking this writ is the unconscionable refusal of the trial court to permit petitioner the effective assistance of counsel. Petitioner is a businessman of good reputation who now stands convicted of a felony for the commission of which he continues to protest his innocence. The indictment did not involve a single act; it was a charge of conspiracy

to commit a series of violations over a period of time extending more than one year. Fourteen overt acts were alleged. Petitioner lived in Ohio and was indicted in West Virginia. The witnesses were scattered over the tri-state area of Ohio, West Virginia and Pennsylvania. The scene of the offense was many miles from the place of indictment. These circumstances alone would dictate the necessity of time for adequate preparation.

Petitioner is acutely aware of the burden he must meet if he is to demonstrate to the satisfaction of this Court that his right to a fair trial and to the effective assistance of counsel was prejudiced by the mere refusal of the trial court to grant him sufficient time in which to prepare his defense. It is universally recognized that a motion for continuance is addresed to the sound discretion of the court, the exercise of which will not be disturbed in the absence of a clear showing of abuse or of manifest injustice. Whether the refusal to grant a continuance constitutes an abuse of discretion can only be determined in light of the facts of the particular case. Merely relating the chronology of petitioner's endeavor to obtain counsel from the time of his indictment demonstrates the diligence with which he proceeded.

Petitioner was indicted December 12, 1956, and was arrested two days later. He immediately contacted his personal attorney in Youngstown who arranged a conference with the United States Attorney in Fairmont, West Virginia, after the first of the year. Since the conference resolved nothing, petitioner's attorney advised him to obtain local counsel and withdrew from the case. At this point more than three weeks had elapsed. Mr. Tinker was retained as local counsel on

January 7th, the date of arraignment. Mr. Tinker's investigation of the case and preparation for trial were cut short by the death of his father-in-law on January 13th. When the Court refused to grant a continuance under the circumstances Mr. Tinker withdrew as counsel less than one week prior to the January 21st trial date. It was January 17th, four days before trial, when Mr. Goodwin was retained. Mr. Goodwin took ill on January 20th and on the following day his associate, Mr. Spillers, was compelled to handle the case. The case required more time to try than Mr. Spillers had in preparation for trial. He saw petitioner for the first time two days before trial.

When Mr. Tinker was retained two weeks prior to the trial date he was fully aware of the limited time available to him for preparation. The subsequent death of his father-in-law, Attorney Charles McCamic, made it mandatory for him to seek a continuance. *Although the United States Attorney did not oppose Mr. Tinker's request for a continuance,* the court nevertheless summarily denied the motion, thereby compelling Mr. Tinker to withdraw, despite the fact there were other and older cases on the trial docket. Petitioner was at once confronted with a critical situation over which he had no control. He desperately sought assistance elsewhere and four days before trial retained Mr. Goodwin. Mr. Goodwin, a veteran trial lawyer, immediately directed his entire effort toward preparation. When he became ill the day before trial his associate, Mr. Spillers, had to take charge. Fully apprised of these facts, the court again refused a continuance, charging that petitioner's predicament was caused by his lack of diligence in retaining counsel! Again the government did not oppose the motion for continuance.

The court had previously indicated to government counsel that it was the court's desire to set the case for trial a week earlier, January 14th. Not until the United States Attorney represented to the court (unbeknown to petitioner) that "it would be only fair" to allow the defense further opportunity to prepare did the court finally set the case for the 21st. In rejecting the final plea for continuance the court accused petitioner of being very lax in his efforts to secure counsel; of sitting idly by and doing nothing in connection with the preparation of the defense; of being entirely at fault due to his own dereliction; and of being inexcusably negligent in not engaging counsel until three or four days before trial. In conclusion the court stated that the "reason" for proceeding without further delay was the large number of witnesses summoned from a distance at great expense to the government, some of whom might have difficulty in returning at a later date.

The question arises as to what else could have been accomplished for petitioner had additional time been available. Were the rights of petitioner substantially prejudiced? The very nature of the charge, conspiracy, denotes vast complication; and this was not conspiracy to commit a single act but conspiracy to commit a series of transgressions over a period of time of more than one year. The government had subpoenaed more than thirty witnesses, twenty-one of whom testified. None of them resided locally. Defense counsel did not have time to interview a single government witness in advance of trial although some of them were personally known to petitioner. The government consumed many months investigating the rec-

ords of companies involved, and securing the statements of witnesses, an equal right which was denied petitioner.

Counsel is fully conscious of the desirability and necessity for speedy disposal of pending cases. However, neither such desire nor necessity can be permitted to infringe upon the inherent right of an accused to defend himself. The government enjoys unlimited facilities for investigation. It can proceed at its leisure and indict at its convenience. But an innocent person need not anticipate prosecution. He has no reason to seek the aid of counsel until he has been charged with crime. If he wants a speedy trial, after indictment, he may demand it. Conversely, is he not entitled to a reasonable opportunity to procure counsel and to prepare his defense? The cost of defense is on the accused regardless of guilt or innocence and his financial resources are usually limited. Time is of essence not only to seek out competent counsel but to plan and prepare adequate defense. In cases resting on circumstantial evidence, such as this, the accused is frequently confronted with the task of proving affirmatively his own innocence if he is to dispel the inmuendo of guilt. Careful preparation is required. After he is put on notice, of course, he cannot sit on his hands. He must act promptly in his own interest.

Here, petitioner did just that. In the five weeks from indictment to trial he had four different lawyers. The first, Mr. Modarelli, was his personal attorney not versed in criminal law; the second, Mr. Tinker, was compelled to withdraw because of a death in his family; the third, Mr. Goodwin, was incapacitated by illness the day before trial; and the fourth, Mr. Spillers, had

to try the case virtually without preparation. These facts were fully disclosed to the trial court. Their merit must have been apparent to the United States Attorney who did not oppose the repeated requests for continuance, yet the court accused petitioner of dereliction and summarily rejected the motions. Petitioner was thereby deprived of his day in court and denied his right to the effective assistance of counsel. Guilt or innocence notwithstanding, petitioner was entitled to a reasonable opportunity to defend himself. This he did not have.

Why was the court so opposed to a continuance? What harm could possibly result from a reasonable postponement when there were other cases on the trial docket to occupy the time of the court and jury? The case was not one of great public concern nor did it involve an offense of atrocity. The government did not oppose a continuance and it was only through the voluntary intervention of the United States Attorney that the trial was set for January 21st rather than one week earlier. The court expressed vexation with what it termed lack of diligence on the part of petitioner. But the court also cited as a reason the "great expense" to the government in recalling witnesses from a distance in event of postponement—truly a minor economy in a major criminal trial. If any reason was required, none other was assigned. Could the court have been influenced by another factor—a common practice which cannot be too severely condemned? Petitioner's co-defendants pleaded guilty prior to trial. Their sentencing was held in abeyance pending petitioner's trial. Without their testimony the government had no case against petitioner. There is no suggestion that they were promised any reward

for testifying for the prosecution (in fact, DeArdo subsequently received the same penitentiary sentence as petitioner—three years). Yet the intense hope for leniency in return for cooperation by those whose liberty is at the complete mercy of the court cannot but influence their testimony. Thus the co-defendants were eager to assist the government in their fervent wish for reward. They had pleaded guilty and were entitled to be sentenced promptly. Had petitioner's trial been postponed would they have received their prompt sentences or would it have been necessary to delay their sentencing, too, to avoid transforming their cloak of friendliness into one of hostility? With sole discretion vested in the court, petitioner was caught in a situation from which he could not extricate himself.

The question of continuance is a major problem confronted by trial courts in nearly every criminal case. Yet it is a matter on which the Federal Rules of Criminal Procedure are silent. It is left to the discretion of the trial whose rulings are seldom disturbed. Apart from the merits of this case is it not time for this Court to lay down general limits within which the discretion may operate? Untold hours of court time are consumed in arguing motions for continuance, the denial of which is frequently cited as error on appeal and summarily disposed of by the appellate court. Defendants in civil cases are guaranteed specific times in which to answer or plead. Extensions of time are liberally granted ex parte if not by agreement of counsel. In important cases delays for months and even years are tolerated solely to permit the parties adequate time in which to prepare. Why must the defendant in a criminal case be contin-

ually at the mercy of the individual court or of an over-zealous prosecutor? Why is he not afforded the protection enjoyed by his civil counterpart? This is not an attempt to slow the administration of justice, rather it is a plea for this Court to take cognizance of a troublesome, reoccurring problem that should be circumscribed for the future conduct of criminal proceedings.

Counsel for petitioner have consciously avoided the common practice of citing other possible grounds of error, thereby endeavoring to emphasize the urgent necessity and desirability of reviewing the nebulous law of continuances in criminal cases. The issue is presented cleanly and precisely in trust that this Court will undertake the solution.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of West Virginia At Wheeling

Opinion

(Argued October 7, 1957 Decided October 18, 1957)

Before Parker, Chief Judge, and Soper and Haynsworth, Circuit Judges.

Lawrence R. Bloomenthal and C. Lee Spillers (Thomas A. Goodwin on brief) for Appellant, and Albert M. Morgan, United States Attorney, for Appellee.

Per Curiam:

This is an appeal in a criminal case in which appellant was convicted of conspiracy to transport goods in interstate commence knowing them to have been stolen. Error is claimed with respect to refusal to grant a continuance, with respect to alleged refusal to require counsel for the government to turn over to defense counsel a statement made by a government witness and in denying a motion for a directed verdict.

The granting of a continuance was a matter resting in the sound discretion of the trial judge and we cannot say that there was an abuse of the discretion. Continuance was asked because of their illness of local counsel who had been retained to represent appellant; but appellant, who had been indicted more than a month before the trial, was represented by other counsel, and the partner of the attorney who was ill appeared and conducted the trial in his

stead. As the attorney appearing in court was a trial lawyer of ability who had served as United States Attorney of the district, and as it does not appear that there was any failure to secure proofs desired by appellant or that appellant was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground.

With respect to the alleged refusal of the court to require the statement of a government witness to the F. B. I. to be furnished to counsel for the defense, it appears that the United States Attorney furnished to defense counsel a copy of the statement of the witness and that defense counsel accepted it, and raised no question with regard thereto at the time. This, we think, was sufficient to meet the requirement of the rule announced in the case of Jencks v. United States 353 U.S. 657.

As to the sufficiency of the evidence, the rule is well settled that on a motion for a directed verdict the evidence must be considered in the light most favorable to the government; and, when the evidence here is so considered, there can be no real question as to its sufficiency. The appellant was charged with a conspiracy to purchase steel from the plant manager of a corporation, knowing that it was being stolen from the corporation by the plant manager. There was no question as to the purchase of the steel from the plant manager or as to its being delivered and paid for under highly suspicious circumstances. The whole defense rested upon appellant's denial of guilty knowledge, but this was established by direct evidence of the plant manager, DeArdo, and corroborating circumstances which pointed unmistakably to appellant's guilt. As said by the trial judge in denying the motion for directed verdict:

> "You have the testimony of DeArdo, and the court very distinctly understood him to say, or at least that was the court's impression of his testimony, that they

were to split the proceeds from these sales on a fifty-fifty basis, not the commissions but the proceeds from the sales. He has testified that he received from Mr. Franken in cash on various occasions, some of it paid to other parties to be relayed to DeArdo, between eight and nine thousand dollars, which would conceivably be many many times a half of the split of reasonable commissions on these sales. Even that would be a circumstance which would tend to charge this man with guilty knowledge in connection with that transaction, if property was being taken out of the plant of the Lorentzen Hardware Manufacturing Company and sold to these steel mills round over the country in a period of time, according to Mr. Brown's testimony as I remember it, when steel was very tight, it was difficult to get that grade of steel. Here's a company who is in the manufacturing business buying steel for its own manufacturing purposes. Only on one occasion, according to the testimony, was any of the steel sold what we would term rejects; the rest of it was prime steel, and for which Sharon was paying an average of something between five and five and a half cents, or little over five cents a pound—some of it was sold in Chicago for something around seven and a half cents—but in a period when steel was scarce, and taking it out of a manufacturing plant, a plant which would ordinarily not have been selling steel at all, all of these circumstances are circumstances which, in my opinion, the jury has a right to consider in connection with DeArdo's testimony."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM the United States District Court for the Northern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 18, 1957

JOHN J. PARKER
Chief Judge, Fourth Circuit

APPENDIX C

Order

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

This Court having at its October term, 1957, rendered its decision affirming the judgment of the said District Court appealed from in this cause, and the appellant having on November 15, 1957, filed a petition for a rehearing of the said cause, and the same having been fully considered:

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied.

November 19, 1957.

JOHN J. PARKER
Chief Judge, Fourth Circuit